I. INTRODUCTION

There are now many hearing boards operating in air pollution control districts and air quality management districts throughout California. In general, these hearing boards operate pursuant to the same laws. However, their procedures differ greatly. Some, like the Bay Area Air Quality Management District, have relatively detailed rules of procedure and operate in a relatively formal fashion. Other hearing boards have no written rules and operate more informally.

Many individuals who are chosen to be hearing board members have no previous experience conducting or participating in administrative hearings. And new hearing board members may not be familiar with the work of the air districts. This information has been prepared in an attempt to help new hearing board members understand their jobs. Our aim is to provide some information about the laws which affect hearing boards and about the procedures which are commonly followed in administrative hearings. There are many questions which are not answered by this document, and it is not a substitute for legal advice in a particular case. Moreover, the laws change. This document reflects the laws as of early 2002. There is no doubt that additional changes will follow.

We have tried to make the booklet a document which can be of use to both lawyers and non-lawyers. When legal language is used, we have tried to explain it. And we have tried to explain the reason for various rules when we can. We hope that this information is useful to you. If you have questions, you may contact Leslie Krinsk at the Air Resources Board.

II. DISTRICTS AND THEIR FUNCTIONS

Air pollution control in California occurs at three levels: federal, state, and local. Local and regional air pollution control districts or air quality management districts ("APCDs" or "districts") are charged by statute with the primary responsibility to control air pollution from nonvehicular, i.e., stationary or industrial, sources. The goal of this control effort is to achieve and maintain the state ambient air quality standards which are adopted by the California Air Resources Board (ARB) and to endeavor to attain and maintain the national ambient air quality standards adopted by the federal Environmental Protection Agency (EPA). All of the powers and duties which the APCDs (as well as the ARB) have are set forth in the Health and Safety Code, sections 39000-44474, while the powers and duties of the EPA can be found in the federal Clean Air Act, 42 U.S.C. sections 7401-7624.1.

The Legislature has given the districts a number of tools to carry out their responsibilities. Acting through district boards of directors consisting of locally elected supervisors or other local officials, and, in some cases, appointed members, the APCDs enact rules and regulations which apply to various stationary sources and indicate such things as which sources require permits to construct and/or operate, the criteria which must be met in order to receive such permits, and the nature and amount of various pollutants which a particular type of source may emit.

Unless there is a state law (generally in the Health and Safety Code) which imposes a specific duty or grants a specific power to the district (for example, the law explicitly provides for inspection of sources of air contaminants) or sets a general statewide standard for a source (for example, for visible emissions), the only way a

district can direct a source to do anything is through the adoption of specific rules and regulations which are authorized by state law and which are clear and specific enough so that the source owner/operator is aware of exactly what is expected. The district board of directors thus performs the legislative function of the district, adopting rules and regulations.

Once rules and regulations are adopted, the district implements and enforces them and state law through the Air Pollution Control Officer (APCO) or executive director and the staff. This is accomplished by appending conditions to permits which insure compliance with the rules, surveying and inspecting the sources, monitoring the emissions of specific sources, enforcing the generally applicable provisions of state law (for example, the nuisance provision, which prohibits any source from emitting such quantities of air contaminants as may cause annoyance or endanger the public health or safety), and bringing certain cases involving sources which are alleged to be in violation of district rules or state law to the hearing board or the courts for adjudication. The APCO and the staff therefore perform the executive function of the district, implementing and enforcing the rules.

While often the APCO will either obtain compliance with district rules through discussion and settlement or go to court to obtain civil penalties or injunctive relief, the Legislature has also provided for another branch of district activity by creating hearing boards. The hearing board adjudicates certain types of disputes which may occur between the APCO and a source, such as whether a permit was properly denied; or, in some districts which allow citizen appeals, whether a permit was rightfully issued. A hearing board is also the sole body in the district which may grant a variance from

district rules upon application of the source owner/operator and may issue an abatement order, when a source has been recalcitrant in complying with district rules. While hearing board activities will be discussed in greater detail below, it can be seen that hearing boards perform the judicial function of the district by applying legal criteria to specific factual situations in order to reach decisions which apply to particular sources. Hearing boards do not make rules, but rather are bound to apply the standards set forth in district rules and regulations and state law to the specific cases brought before them for resolution. The members of the hearing board are appointed for fixed terms of three years.

By acting in concert, the three branches of the district carry out the statutory mandate to control air pollution from stationary sources so that state and federal ambient standards, which represent healthful air, will be achieved and maintained.

III. DUTIES OF HEARING BOARD MEMBERS

Pursuant to Health and Safety Code section 40806, the hearing board must select a chairperson from its members. The hearing board may also wish to select a vice-chairperson to serve in the chairperson's absence. It is the responsibility of the chairperson to preside at the hearings; to control the Hearing Board's calendar; to assign tasks to hearing board members, such as the drafting of orders; to act as a liaison between the hearing board and the district staff; and to sign letters from the hearing board.

In presiding, the chairperson is responsible for seeing that each hearing proceeds in an orderly fashion. Most hearings will be relatively brief. However,

occasionally a complicated case will arise. When it appears that a lengthy hearing with many issues, witnesses, and documents is likely, the chairperson may wish to use some of the case management techniques used by the courts. A prehearing conference may be held at which the hearing board members and the parties meet to discuss the issues, the facts, documents, witnesses, stipulations, and other matters. See, Federal Rule of Civil Procedure 16 (pretrial conferences). The prehearing conference may take place on a different day from the hearing, or it may be held just before the hearing. If the prehearing conference is conducted by a quorum of the hearing board, it must comply with the Brown Act's open meeting requirements. The hearing board may also require that the parties confer alone before the hearing and that they submit written statements of facts, issues, and stipulations.

Even in a routine case, the hearing board may wish to distribute informational materials to the parties describing the hearing board's procedures and the issues to be decided and providing some information about evidence and burden of proof. The hearing board may also wish to request a written response to the initial document filed in the case.

At the hearing, the chairperson may ask the parties to estimate the amount of time which is needed for each witness and may require the parties to adhere generally to the time estimates. If the time estimates seem excessive or are being significantly exceeded, the chairperson may ask for an explanation from the representatives for the lengthy questioning. The chairperson may also note the issues which are of interest to the hearing board and may ask the parties to focus on those issues. If it appears that a conference between the parties will shorten the hearing, the hearing may be recessed

briefly or may be continued until another day. A similar continuance of the proceedings may be appropriate if it appears that additional information is needed.

Any hearing will proceed more smoothly if the hearing board members have read the documents submitted by the parties and have reviewed the relevant regulations. If the hearing starts promptly, it is an indication to the parties that attention is being paid to the schedule and to the time of the numerous people who may be gathered for the hearing.

At least three of the hearing board members have areas of special expertise (the attorney, the engineer, and the physician), and the public members are also likely to have areas of relevant knowledge. It is expected that the members will use their expertise to evaluate the evidence presented at hearings and, perhaps, to answer questions of their colleagues during deliberations.

The hearing board is a quasi-judicial body. Thus, the hearing board members may wish to be guided in their conduct by the Code of Judicial Ethics adopted by the California Supreme Court. The Code contains many sections which are relevant to hearing boards. It states, for example,

> A judges shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of all court staff and personnel under the judge's direction and control.
>
> Canon 3B(4).

The Code also states, "A judge shall dispose of all judicial matters fairly, promptly, and efficiently." Canon 3B(8). The commentary explains,

> Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to require that court officials, litigants, and their lawyers cooperate with the judge to that end.

The Code also provides that a judges shall "respect and comply with the law and shall act at all times in a manner that promotes public confidence and impartiality of the judiciary." Canon 2A.

And the commentary explains, "A judge must avoid all impropriety and appearance of impropriety." For hearing board members, this means that they should avoid, for example, an unduly informal relationship with the district staff.

The Code also states,

> A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, national origin, or sexual orientation.
>
> This canon does not apply to membership in a religious organization or an official military organization of the United States. So long as membership does not violate Canon 4A, this canon does not bar membership in a nonprofit youth organization.
>
> Canon 2C.

The commentary explains,

> Membership of a judge in an organization that practices invidious discrimination gives rise to a perception that the judge's impartiality is impaired… Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls, but rather depends on how the organization selects members and other relevant factors…

The Code also contains numerous provisions about the responsibility of judges to disqualify themselves when their impartiality might reasonably be questioned:

> A judge shall disqualify himself or herself in any proceeding in which disqualification is required by law. In all trial court proceedings, a judge shall disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no actual basis for disqualification.
>
> Canon 3E.

In addition, disqualification of hearing board members is required in certain circumstances by the Political Reform Act of 1974, Government Code sections 81000-91015. Government Code section 87100 provides, "No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." However, a public official may participate in the making of a decision "to the extent his participation is legally required for the… decision to be made." Government Code section 87101. The "fact that an official's vote is needed to break a tie does not make his participation legally required." Id. And each hearing board member must submit an annual financial disclosure form containing information about the assets and income of the hearing board member, the member's spouse, and the member's dependent children.

IV. TYPES OF CASES ADJUDICATED BY HEARING BOARDS

The Health and Safety Code[1] delegates to the hearing boards the authority to hear and decide three types of cases: applications for variances, requests for abatement orders, and permit disputes. Although the conduct of these hearings varies somewhat from district to district because hearing boards may adopt their own procedural rules, some uniformity is insured because the basic requirements are set

[1] All references are to the Health and Safety Code unless otherwise noted.

forth in the Health and Safety Code and, pursuant to section 40807, the hearing board rules must conform as far as practicable to the rules for administrative adjudication by state agencies found in the California Administrative Procedure Act, Government Code sections 11500-11528.

A. Variances

Usually a variance application is filed by a private industrial, commercial, or agricultural business which is subject to the rules and regulations of the district and is seeking temporary relief from the requirements of those rules. On occasion, a public or quasi-public agency, such as a sewage treatment plant, a utility, or the military, also seeks a variance. The statutory provisions governing variances are set forth in sections 42350-42364. There are two circumstances in which a variance cannot be granted. No variance can be granted if a public nuisance (a violation of section 41700) will result; and no variance can be granted from a requirement that a permit be obtained to build, alter, or replace a source of air contaminants, if the district has established a permit system pursuant to section 42300. In districts with emission-capped trading programs, no variance shall be granted from the emission cap requirements.

The goal of the variance applicant is to obtain permission from the hearing board to operate despite being in violation of a district regulation, while steps are taken to bring the source into compliance with the regulation. Section 42352 sets forth the criteria which the applicant must satisfy in order to receive a variance. The burden of proof is on the applicant to show by the presentation of argument and evidence that each of the following 6 criteria are met. First, the applicant (also called petitioner) must show that the source is or will be in violation of section 41701 (regarding visible

emissions) or of any rule, regulation, or order of the district. This requirement is usually easy to prove and the least subject to debate by the APCO, who is also a party to a variance proceeding and will usually present argument and evidence after the presentation of the applicant's case.

Second, the applicant must demonstrate that, due to conditions beyond its reasonable control, requiring compliance would result in either an arbitrary or unreasonable taking of property or the practical closing or elimination of a lawful business. To show this, the applicant must show the hardship which requiring present compliance would impose. Evidence which bears on this includes the nature of the applicant's goods, services, or business; the extent to which others could provide such goods or services; the size of applicant's labor force and payroll; the amount of applicant's investment in the facility; and the ability of the applicant to stay in business if there is a temporary closure or curtailment of production.

The applicant must also normally demonstrate a reasonable level of past diligence in trying to comply with the standard in order to establish that compliance is beyond its reasonable control. If the applicant's predicament is one which diligence could have avoided, then no variance should be granted; the purpose of the statute is not to protect negligent or irresponsible sources. A source which waited to apply for variance relief until the district's enforcement staff focussed upon it, despite noncompliance well before that, may not be entitled to variance relief. The hearing board should, therefore, be provided with evidence regarding the history of the source's compliance, its contacts with the district, the effective date of the regulations affecting

the source, the availability of control equipment, and, perhaps, the practices and compliance status of similar sources.

Third, the applicant must demonstrate that the harm to the applicant's business which would be caused by compliance would be without a corresponding benefit in reducing air contaminants. This criterion focuses specifically on the source's emissions and requires the hearing board to balance competing interests: the hardship to the applicant of immediate compliance versus the benefit to the public if the pollution is immediately curtailed. Relevant evidence here includes the nature and quantity of air contaminants being emitted, the time period needed to achieve compliance, the type of neighborhood, and the health effects of the pollutants.

Fourth, the hearing board must find "that the applicant for variance has given consideration to curtailing operations of the source in lieu of obtaining a variance." The hearing board must determine that the petitioner has actually considered limiting operations to reduce excess emissions rather than just applying for a variance in order to continue to operate at maximum capacity. It should also be determined that the variance will not give the petitioner an unfair competitive advantage over other businesses of the same type.

Fifth, the hearing board must require that during the period the variance is in effect, the applicant will reduce excess emissions to the maximum extent feasible. That is, the hearing board must determine that the source is reducing excess emissions to the maximum extent feasible. A variance should not give the source a license to pollute. The hearing board may want to include conditions in the variance order that ensure that the petitioner is indeed reducing emissions to the maximum. These could

include interim operating limits, reducing hours of operation, specifying specific fuel types to be used, etc.

Sixth, the hearing board must find that during the period the variance is in effect, the applicant will monitor or otherwise quantify emission levels from the source, if requested to do so by the district, and report these emissions levels to the district pursuant to a schedule established by the district. The district should require emission quantification from the source when appropriate. If the district requires emission levels, a schedule for submittal of the emission levels to the district should be included in the order.

If all of the criteria are met, the hearing board may grant the variance. However, the hearing board may impose alternative (but not more onerous) requirements for the period until compliance with the rule is achieved. Section 42353. The drafting of an effective variance therefore requires consideration of such factors as the time needed for solving the applicant's pollution problem (including the amount of time needed to order, receive, install, test, and bring into effective operation any control equipment the source will use to comply), appropriate operating conditions during the variance period (including possible alterations in production processes, schedules, or equipment), appropriate increments of progress (required by section 42358(b) for any variance which is to be in effect for over one year), and consideration of the imposition of a performance bond to keep the polluter on schedule. Section 42355. Once a variance order is issued, it becomes legally binding on the source. Violation of the terms of the variance subjects the source to the district's enforcement authority and to the penalty provisions in the Health and Safety Code.

Variations from the basic variance include “interim variances,” which may be granted for good cause to an applicant who wants to operate a facility pending the decision of the hearing board on an application for a regular variance. Section 42351. Interim variances may remain in effect only as long as the date of the hearing board’s decision on the variance application or 90 days, whichever occurs first. An emergency variance may be granted by a single hearing board member in any district regardless of population and without notice or hearing. Section 42359.5. An emergency variance may be issued for good cause “including, but not limited to, a breakdown condition.” It may not exceed 30 days in duration. Id.

B. Abatement Orders

The abatement order is the strongest administrative sanction available to a district; once it is issued, violation of its terms subjects the source to a potential penalty of as much as $25,000 for each day of violation as well as to criminal sanctions. Section 42401. It is, therefore, used sparingly, after less onerous enforcement practices fail to correct an air pollution problem. An abatement proceeding is generally initiated by the district staff against the polluter. It may also be initiated by the board of directors or the hearing board itself. Section 42451. In an abatement case the district, which has the burden of proof, must prove that the source will continue to illegally pollute unless restrained by an order for abatement.

Proof of violation of section 41700 or 41701, or of any district rule, regulation, or order prohibiting or limiting the discharge of air pollutants is required for an abatement order to be issued. Section 42451. The district’s evidence will focus upon the severity of the violation. Rarely will the district seek an order requiring a complete shutdown of

the source; rather, a conditional abatement order is usually sought which requires corrective action to be taken according to a specified schedule. An abatement order may be issued pursuant to the stipulation of the district staff and the violator. If this is done, the hearing board need not make a finding of violation. However, the hearing board is responsible for including a written explanation in its order. Section 42451.

C. Permit Disputes

The final matters which hearing boards must hear and decide are permit disputes. Once a permit system is established by a district pursuant to section 42300, there are several ways a permit matter can reach the hearing board. First, a permit applicant whose permit has been denied by the APCO has the right to have the hearing board determine whether or not the denial was justified. Section 42302. Second, a permit holder whose permit has been suspended by the APCO (for failure to furnish the district with requested information about the source's emissions) may have the hearing board determine whether or not the suspension was proper. Section 42306. Third, the APCO may ask the hearing board to determine whether a permit should be revoked when the permit holder is violating district requirements. Section 42307. Fourth, district refusals to approve reductions in emissions for banking, pursuant to section 40709, may be appealed to the hearing board pursuant to section 40713. Some district rules also allow any person, including an individual or organization, to appeal to the hearing board a decision of the APCO on a permit application.

In reaching a decision on these permit matters, hearing boards are provided with less statutory guidance than in the other two classes of cases; hearing boards must exercise considerable discretion when resolving these controversies. Because the

burden of proof falls upon the party challenging the district's permit action, the function of the hearing board is to determine whether the APCO has made a fair and reasonable interpretation of the applicable legal requirements. If the district's interpretation is reasonable, it should be upheld. Thus, in variance or abatement hearings, the hearing board exercises its independent judgement based on the evidence presented to it; in permit matters, the hearing board should not substitute its judgement for that of the staff of the district. A review of the district action is, nevertheless, warranted to assure that the action was in compliance with the statutory requirements.

Permit disputes often focus on permits for major facilities which are subject to the district's complex new source review rules, and the evidence presented is often technical and complicated. In a variance case, the emphasis is on such issues as economic hardship, pollution effects, and reasonable controls. Permit matters often involve inquiry into manufacturing processes, emissions predictions based on air quality models, ambient pollution levels, permit review procedures, and the language and interpretation of regulatory requirements. Permit matters may, therefore, be time-consuming. Hearing board members should require the parties to provide clear explanations of the information presented.

After a hearing on a permit matter, section 42309 provides that the hearing board may do any of the following:

(a) Grant a permit denied by the air pollution control officer.

(b) Continue the suspension of a permit suspended by the air pollution control officer.

(c) Remove the suspension of an existing permit invoked by the air pollution control officer pending the furnishing by the permittee of the information, analyses, plans, and specifications required.

(d) Find that no violation exists and reinstate an existing permit.

(e) Revoke an existing permit, if it finds any of the following:

(1) The permittee has failed to correct any conditions required by the air pollution control officer.

(2) A refusal of a permit would be justified.

(3) Fraud or deceit was employed in the obtaining of the permit.

(4) Any violation of [Part 4 of the Health and Safety Code], or of any order, rule, or regulation of the district.

Section 42309.

When additional permit appeals are authorized by district regulation, the authority of the hearing board may include the power to modify the permit.

Any decisions issued by the hearing board in a variance, abatement, or permit case must include the reasons for the decision. Section 40862. The importance of making complete and accurate findings is discussed below in the section on appeals of hearing board decisions.

V. THE PUBLIC'S RIGHT TO HAVE NOTICE OF, ATTEND, AND PARTICIPATE IN HEARING BOARD PROCEEDINGS

California law, as set forth in the Government Code and the Health and Safety Code, requires that members of the public have the opportunity to be fully informed about the work of the hearing board. The law requires public notice of hearing board meetings and an opportunity for the public to attend, observe, and participate in hearing board proceedings. The purpose of these requirements is to insure that members of the

public have the opportunity to influence the hearing board. This has been expressed by the legislature in the declaration of public policy which is part of the Ralph M. Brown Act:

> [T]he Legislature finds and declares that the public commissions, boards, and councils and the other public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly.
>
> The people of this State do not yield their sovereignty to the agencies which serve them. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.
>
> Government Code Section 54950.

A. The Public's Right to Notice of Hearing Board Meetings

Section 40823, the general notice section, requires that the hearing board notify the air pollution control officer and the applicant or permittee at least ten days prior to a hearing, send notice to every person who has requested notice, and publish a notice in at least one daily newspaper of general circulation in the district; the "notice shall state the time and place of the hearing and such other information as may be necessary to reasonably apprise the people within the district of the nature and purpose of the meeting." There are special notice requirements for variance hearings. Sections 40824 and 40825 set forth the notice requirements for hearings to consider applications for variances of not more than ninety days, for interim variances, or for modifications of a compliance schedule. For other variance hearings, the published notice and the notice to interested persons must be given at least thirty days before the hearing, and the application for a variance must be available for public inspection during the thirty days preceding the hearing. Section 40826.

The Brown Act, Government Code section 54950 and following, also contains certain notice provisions. Government Code section 54954.2 requires that "[a]t least 72 hours before a regular meeting," the hearing board "shall post an agenda containing a brief description of each item of business to be transacted or discussed at the meeting." The agenda must also specify the time and location of the regular meeting; it must be posted in a location that is accessible to the public; and, generally, action may be taken only on items which appear on the agenda.

Government Code section 54953 provides for meetings using teleconferencing technology. Additional notice requirements apply. While the Brown Act allows meetings via teleconferencing for legislative bodies, we suggest that such procedures are generally not appropriate for a quasi-judicial proceeding. We therefore encourage hearing boards to use teleconferencing as a last resort.

Pursuant to the Brown Act, when a meeting is adjourned to another time or place, a copy of the order of adjournment must be posted within twenty-four hours on or near the door of the place where the meeting was held. And there must be a similar posting when a meeting is continued. The meeting must be adjourned or continued to a particular time and place. Otherwise, the general notice process must be repeated. Notice of a special meeting must be posted at least twenty-four hours prior to the meeting at a location accessible to the public, and notice must be given to each local newspaper of general circulation and to each radio and television station which has made a written request for notice.

Action may be taken on items not on the posted agenda when a majority of the hearing board determines that an emergency, as defined in Government Code section

54956.5 exists; when two-thirds of the hearing board members (or all members present when fewer than two-thirds of the members are present) determine that the need to take action arose after the agenda was posted; or when the item was posted for a meeting occurring not more than five days earlier and continued to the meeting at which action is being taken. Government Code section 54954.2[2]

B. The Public's Right to Observe Hearing Board Meetings

Pursuant to section 40808, no abatement order, permit, or variance other than an emergency variance may be issued, modified, or revoked by a hearing board without a "public hearing." This has consistently been interpreted to mean that members of the public may generally be present to observe the receipt of evidence by the hearing board. The public's right to participate in the hearing is discussed in the next section.

The Brown Act requires that the hearing board provide significantly greater access to the public than is required by the Health and Safety Code. The Brown Act requires that the public be allowed to observe not only the evidentiary portion of hearings but also the board's deliberations and voting. Indeed, any gathering of a quorum of the hearing board, no matter how informal, where the hearing board's work is discussed must be open to the public. This includes lunches, dinners, and other functions. However, mere social attendance of a quorum of the hearing board at meals and other gatherings is not precluded by the Brown Act. Thus, hearing board members may attend such gatherings together and exclude the public, as long as the hearing board's work is not discussed.

[2] An Attorney General's opinion issued in March 1988 concludes that air district hearing boards are subject to the Brown Act. 71 Ops. Cal. Atty. Gen. 96.

Pursuant to the Brown Act, regular meetings of the hearing board must be held. Members of the public must be allowed to attend all covered meetings without having to register or give information as a condition of attendance. Any person may tape or record the proceedings, unless the hearing board has made a reasonable finding that the recording would cause a disruption. And the meetings may be broadcast by radio or television, pursuant to Government Code section 6091.

The Health and Safety Code requires that hearing board proceedings be recorded. Pursuant to the Brown Act, the public must be able to listen to the tape recordings and review transcripts of hearing board proceedings, if transcripts have been prepared.

The Brown Act allows closed sessions under certain circumstances. For example, a closed session may be held for consideration of the appointment, employment, performance, or dismissal of a public employee, or for discussion of pending litigation with the hearing board's legal counsel. A closed session may also be held to discuss documents which are exempt from disclosure under provisions of the Public Records Act. The exemption most likely to be used at a hearing is the exemption for trade secrets found in Government Code section 6254.7.

Under the Brown Act, closed meetings will rarely be held. When there is a closed session, the parties to a proceeding may be present, if appropriate; but all members of the public must be excluded. A partially closed meeting is not permitted by the Brown Act.

C. The Public's Right to Participate in Hearing Board Meetings

Pursuant to section 40828, interested members of the public must be allowed a reasonable opportunity to testify in all hearing board cases, and the public testimony must be considered by the hearing board as it makes its decision. In addition, the Brown Act provides, "Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the [hearing board]… on items of interest to the public that are within the [board's] subject matter jurisdiction." Government Code section 54954.3. This section is broader than the Health and Safety Code section since it permits testimony on any matter within the hearing board's jurisdiction. Under the Brown Act, the hearing board may adopt reasonable regulations to limit the amount of time allocated for public testimony on each issue and for each speaker.

D. Enforcement of the Rights of the Public in Connection with Hearing Board Meetings

There are several mechanisms for enforcement of the provisions of the Brown Act. First, after asking the hearing board to correct an alleged violation of the Brown Act and giving the hearing board an opportunity to do so, any interested person may bring a lawsuit to invalidate any action taken in violation of the Brown Act. Second, any person may bring a lawsuit to prevent violations of the Brown Act or to determine the applicability of the Brown Act to past and future conduct of the hearing board. Third, a hearing board member who attends a meeting where action is taken in violation of the Brown Act, with knowledge that the meeting violates the Act, is guilty of misdemeanor.

In contrast to the Brown Act, there are no special enforcement provisions in the Health and Safety Code. However, judicial review of hearing board decisions can be sought. This is discussed below in the section on appeal of hearing board cases.

VI. PROCEDURE FOR HEARINGS

A. Parties

A hearing board proceeding involves certain and distinct persons who appear, participate in the proceeding, and give testimony and legal arguments. Those persons are called parties and may include the following: (1) the district's executive officer or APCO, (2) a person (or corporation or organization) seeking relief from the hearing board (an applicant for a variance or a company appealing from the denial of a permit), (3) a person (or corporation or organization) against whom relief is sought (the respondent in an action by the executive officer or APCO for an order for abatement or permit revocation), (4) in some districts, a person who seeks relief from the hearing board (a person, company, or organization appealing the granting of a permit to construct or operate to some other person, company, or organization).

Parties are normally called applicants (or petitioners), appellants, or respondents, depending upon the type of proceeding. Applicants or appellants are parties requesting relief from the hearing board. Respondents are parties against whom relief is being sought.

B. Initiation of Proceedings

A proceeding before the hearing board is almost always initiated by the filing of a legal document called an application (or petition) or an appeal. The application (or

petition) or appeal must contain a statement of the issues, both legal and factual, which support the granting of the requested relief.

Many districts have rules specifying the required contents of a petition, the number of copies to be filed, and the place for filing the petition or appeal. In general, the petition or appeal is filed with the hearing board clerk, and it is served upon the party or parties against whom relief is being sought. After filing and service of the petition or appeal, the matter should be set for a hearing. The respondent may wish to or may be required to file an answer or response to the application or appeal.

C. Conduct of the Hearing

While hearings conducted by the hearing board resemble courtroom trials, they are generally less formal and should proceed more quickly. The hearings on pending cases often involve the active participation of the hearing board members in questioning witnesses. Facts are proved through the introduction of evidence. A more extensive discussion of evidence is presented in a later section.

In order to give the parties and the public a fair opportunity to present information, a standard order of proceedings is normally followed. Public testimony under the Brown Act, not connected to a case on the agenda, may be heard at the beginning or end of the proceedings on pending cases. To begin each case, the party requesting relief is afforded the opportunity to make an opening statement. The opening statement should outline the party's case, explain what is to be proven, how it will be proven, and what relief is being sought. Then, the responding party is given the opportunity to make an opening statement. The responding party may make an opening statement at this time or wait until the party requesting relief has finished

presenting testimony and documents. Normally, the responding party will make its opening statement immediately after the petitioning or appealing party.

Next, the party requesting relief presents its case in chief, which consists of all evidence necessary to prove the facts essential to obtaining the requested relief. Each witness must swear or affirm to tell the truth. Then the testimony begins. Witnesses testify to facts or lay a foundation for the introduction of documentary evidence, demonstrative evidence, or the opinions of an expert witness. The process by which a party elicits this testimony is called direct examination. It takes the form of questions to and answers from each witness. After each witness has been questioned on direct examination, the opposing party is permitted to question the witness regarding statements or answers given during direct testimony. The questions asked by the opposing party are called cross examination. The parties are generally afforded a great deal of latitude on cross examination, since the purpose is to determine to what degree the testimony given under the direct examination should be relied upon by the hearing board members in reaching their decision.

During examination, a foundation may be laid for the introduction of documents or demonstrative evidence. Demonstrative evidence is evidence such as a model or a sample product. Prior to being introduced into evidence, each item should be identified as an exhibit and given a number or letter identifier. After a proper foundation has been laid, the item may be admitted into evidence and considered by the hearing board. After a witness has been cross examined, hearing board members may, with the permission of the chairperson, ask questions of the witness. In some cases, the party requesting relief may wish to ask the witness additional questions relating to questions

asked during cross examination. This is called redirect examination. After redirect questions are concluded, the opposing party may wish to ask additional questions relating to the answers given to the redirect questions. This is recross examination. The hearing board members may then again ask questions. This process may continue until there are no more questions or until the chairperson curtails questioning as repetitious or unproductive.

After the party seeking relief presents all of its witnesses and exhibits, it will rest its case. Then, the opposing party's representative will present an opening statement (if one has not already been presented) and will begin presenting that party's case. The presentation of the opposing party's case follows the same procedure of direct examination, cross examination, redirect, and recross.

Upon the conclusion of the presentation of the opposing party's case, the party requesting relief may be allowed to present rebuttal evidence, to rebut new testimony presented by the opposing party. After this is concluded, the opposing party may seek leave to present surrebuttal testimony. Both rebuttal and surrebuttal testimony is subject to cross examination, redirect examination, and recross examination. After the presentation of information by each party, members of the public with comments about the case are given an opportunity to present information.

The party requesting relief will then be allowed a closing statement in which the important facts of the case will be highlighted, testimony presented by the opposition will be distinguished, the legal principles supporting that party's position will be cited, and the relief requested will be stated. The opposing party will then be allowed to present a closing statement. Finally, the party requesting relief may be afforded the opportunity to

make a final statement. The hearing is then closed, the matter is deemed submitted for decision, and the hearing board makes its decision.

The party requesting relief has the burden of proof in the proceeding. That is, that party has the burden of proving by a preponderance of the evidence every fact necessary to support the claim for relief. Preponderance of the evidence means the amount of evidence showing that the fact sought to be proved is more probable than not. It does not refer simply to the quantity of witnesses, documents, exhibits, or objects in evidence. Rather, it is a measure of the quality of the evidence; the focus is on the evidence which is more credible and convincing. Failure to prove one necessary fact results in the denial of the requested relief.[3]

D. Findings and Decision

In many cases, the decision will be made immediately following the submission of the matter. In some cases, because of the complexity of the issues, the hearing board may want to give each member an opportunity to consider the evidence and make some individual determinations, before meeting and reaching a final decision. It is common practice for the hearing board members to discuss the case in open session, giving their views of the evidence.[4] After this discussion one member makes a motion to grant or deny relief to the party requesting it, after which further discussion may ensue. Finally, the hearing board members vote on the motion. Three affirmative votes are required to grant relief. If the motion fails, alternative motions can be made and

[3] The issues which must be decided by the hearing board in various cases are discussed above in Section IV.
[4] The Ralph M. Brown Act, which requires public deliberations when a quorum of the hearing board meets, is discussed above in Section V.

voted upon, until a motion passes or it appears three votes cannot be obtained for any relief.

In making its decision, the hearing board must consider only the evidence and public comment received during the proceeding. Statements of the parties or their attorneys which are not made under oath are not evidence. Furthermore, exhibits which were not formally entered into evidence are not evidence. Hearing board members may not conduct their own experiments or go on their own fact-finding expeditions without affording all parties the right to accompany them and rebut or impeach the evidence adduced. Similarly, hearing board members may not engage in off the record, private communications with parties or witnesses regarding the matter being heard. These communications are called ex parte communications and are strictly prohibited. They give the impression of unfairness and may result in a decision based upon information not on the record of the proceeding. Finally, hearsay evidence is entitled to less weight than evidence which is not hearsay. Hearsay evidence will be discussed in more detail below.

VII. EVIDENCE

Evidence is defined in California by Evidence Code section 140 which provides,

> "Evidence" means testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact.

In each of these categories, evidence may be presented which is either direct or indirect evidence. Indirect evidence is commonly called circumstantial evidence. Direct evidence means "evidence that directly proves a fact, without an inference or

presumption, and which in itself, if true, conclusively establishes that fact." Evidence Code section 410.

Direct evidence takes several forms: (1) testimony by a witness who actually experienced or perceived the facts about which he or she is testifying (e.g., an inspector who testifies about taking a sample of coating that a company was found using), (2) opinion testimony by a witness qualified as an expert in the field in which he or she is testifying (e.g., an inspector who testifies about the opacity of a cloud of smoke seen emanating from a factory), and (3) a writing bearing on the issues of the hearing (e.g., the laboratory report showing that the coating sampled had volatile organic compounds in excess of those allowed by a district rule).

Circumstantial evidence does not directly prove a fact, but is evidence of facts or circumstances from which inferences may be drawn about the existence or nonexistence of facts in issue. One example which may arise in hearing board cases is evidence of prior and subsequent conditions or acts. If direct evidence of an emission violation occurring on January 10 is produced, along with direct evidence of an identical violation on January 20 of the same year, and further evidence is produced that at all times between January 10 and January 20 the equipment was in the same condition and operated in the same manner, an inference may be drawn that there were also violations on the days between January 10 and January 20. Thus, the evidence of the violations on January 10 and 20 is direct evidence of violations on those two dates, but combined with evidence of the condition of the equipment and its operation during the period between those dates, it is circumstantial evidence of a continuous violation.

Evidence is usually presented through testimony given by witnesses under oath. It may, however, take other forms. Demonstrative evidence consists of things like models or devices which are addressed directly to the senses without intervention of testimony. Examples of demonstrative evidence are a gasoline nozzle or an air pollution control device. Documentary evidence consists of writings such as letters, memoranda, business records, production reports, and invoices.

Matters subject to judicial notice are also considered evidence. It is not necessary to prove matters which may be judicially noticed. California and federal laws, air pollution control district and air quality management district rules and regulations, the meaning of English words and phrases, and facts generally known are all subject to judicial notice.

In order for evidence to be considered in determining the existence or nonexistence of a fact, it must be admissible. For the purposes of this discussion, there are certain factors which affect the admissibility of evidence. First, the evidence must be relevant. Evidence Code section 210 provides a very good definition of relevancy:

> "Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

Second, if the evidence is testimony of a witness, the witness must be competent to testify to the evidence being adduced. Except in the case of an expert witness, a witness must have personal knowledge of the facts to which he or she is testifying. Personal knowledge means a present recollection of an impression derived from the exercise of the witness' own senses. A witness may give an opinion regarding facts in

dispute if it is based upon reliable matter and the witness qualifies as an expert witness. "A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." Evidence Code section 720.

If documentary evidence is to be admissible, a foundation must be laid showing that it is the document that the person offering the evidence says it is. If demonstrative evidence, such as a model, is to be admissible, a foundation must be laid showing that it is a true and accurate representation of what it purports to represent. A foundation is normally provided by the testimony of a witness who has personal knowledge of the document or exhibit.

Finally, even if a matter is relevant, the witness is competent, and a proper foundation is laid, some evidence may be ruled inadmissible because of other rules or policies affecting it. Evidence that is otherwise relevant may be excluded because its probative value is substantially outweighed by the time it takes to present it, or by the probability that it will create undue prejudice, or because it is inadmissible hearsay, or because the information is privileged. While many of these evidentiary rules are difficult, one with which hearing boards are frequently confronted is that pertaining to hearsay evidence. The frequency with which hearing boards are confronted with hearsay evidence, coupled with limits on how it may be used by the hearing board, warrants a fuller discussion of the hearsay rule.

Hearsay evidence is defined by Evidence Code section 1200 as follows:

> "Hearsay evidence" is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated.

While this definition is short, it is far from simple. It needs to be broken down into subparts in order to get a full understanding of it. An aid to understanding is to discuss what hearsay is not. A statement made by a witness while testifying at a hearing in a particular case, is not hearsay in that case. Any statement, which is not offered to prove the truth of the statement, is not hearsay. Evidence of any other statement, which is offered to prove the truth of the statement, is hearsay.

When there is a controversy over whether certain things were said or done and not whether those things are true or false, evidence of those statements or acts is not hearsay. For example, if a witness testifies that a district inspector told him that he did not have to apply for a permit, this testimony is not hearsay if it is being offered to show that his failure to apply was reasonable in light of what the inspector told him (regardless of the accuracy of the inspector's statement).

There are a number of specific exceptions to the hearsay rule, which are too numerous and complicated to explain here. It is recommended that hearing board members assume that hearsay evidence is not sufficient evidence upon which to base a finding that a contested fact exists. If there are any questions regarding whether or not evidence is subject to an exception to the hearsay rule, and that evidence is critical to a hearing board member's decision, that member should seek a ruling from the chairperson on the issue.

In the event that a party attempts to introduce evidence which is inadmissible for some reason, the opposing party may object to the introduction. Failure to object waives that party's right to have the evidence excluded. An objection must be made

upon specific grounds. The chairperson will rule on the objection, either sustaining it or overruling it. If it is sustained, the evidence is not admitted, and it may not be considered in making the decision. If the objection is overruled, the evidence is admitted.

VIII. APPEAL FROM HEARING BOARD DECISIONS

The Health and Safety Code contains provisions pertaining to hearing board decisions in sections 40860-40865. Among other things, these sections provide that a hearing board shall announce its decision in writing and that copies of the decision must be filed with its clerk and mailed to all of the parties or their attorneys. A party may petition for a rehearing within 10 days of the mailing, and the hearing board may, but is not required to, rehear its decision. Section 40861. Within thirty days after the decision has been mailed, judicial review of the decision may be had by filing a petition for a writ of mandate in accordance with section 1094.5 of the Code of Civil Procedure. The review proceeding is called administrative mandamus and it is a special proceeding used to obtain judicial review of adjudicatory decisions of governmental bodies such as hearing boards. Section 1094.5 provides that the court's inquiry shall extend to three questions: whether the hearing board proceeded without, or in excess of, its jurisdiction; whether there was a fair hearing; and whether there was any prejudicial abuse of discretion. Abuse of discretion means that the hearing board has not proceeded in the manner required by law, the order or decision is not supported by the hearing board's findings of fact, or the findings are not supported by the evidence.

The Health and Safety Code does not specify who may file a petition for writ of mandate, but by linking judicial review to mailing of the decision to the "parties or their attorneys," section 40864(a) appears to imply that only the parties may seek judicial review. While the hearing board must allow interested members of the public a reasonable opportunity to testify with regard to a case and must consider such testimony in making its decision, a member of the public who testifies is not a party. However, developments in the law suggest that it is possible the courts will grant mandamus at the request of any affected individual in some circumstances.[5]

The court will use one of two tests to determine whether the evidence supports the findings, and this is probably the most difficult aspect of administrative mandamus to understand. Section 1094.5(c) states:

> Where it is claimed that the findings are not supported by the evidence, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, abuse of discretion is established if the court determines that the findings are not supported by the weight of the evidence. In all other cases, abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of whole record. (Emphasis added.)

The difference in the two tests is significant, for when exercising its independent judgment, the court will examine the evidence before the hearing board, weigh it, resolve any conflicting testimony, and reach a decision independent of the hearing board's decision. If the weight, or preponderance, of the evidence supports the hearing board's decision, the decision will be upheld; if not, the decision will be reversed. On the other hand, when applying the substantial evidence test, the court does not weigh

[5] The following cases are instructive: *Associated California Loggers* v. *Kinder* (1978) 9 Cal.App.3d 34;

the evidence, but it will uphold the decision of the hearing board if there is any substantial evidence to support the findings, regardless of the existence of substantial evidence to the contrary. Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. Thus, the testimony of a single witness may be sufficient. The court must, however, consider all relevant evidence in the administrative record, including evidence that detracts from the evidence supporting the hearing board's decision.

Which test applies to hearing board decisions? The Health and Safety Code does not specify, so it is necessary to consult case law. The independent judgment test applies if the decision by the hearing board affects a fundamental vested right; in all other cases the more deferential substantial evidence test applies. Courts decide on a case-by-case basis whether an administrative decision affects a fundamental vested right.

As stated above, the court will inquire into three areas, the most elusive of which is prejudicial abuse of discretion. The hearing board should bear in mind that this will be established if the decision is not supported by the findings or the findings are not supported by the evidence. The hearing board should, therefore, make findings that are clear and detailed enough to "bridge the analytical gap between the raw evidence and ultimate decision or order."[6] The stating of ultimate facts, following the language of the statute, is not sufficient to serve the functions of findings, which are: 1) to facilitate orderly analysis by the agency; 2) to enable a reviewing court to trace and examine the agency's analysis; 3) to enable parties to the decision to determine whether and on

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and *Horn* v. *County of Ventura* (1979) 24 Cal.3d 605.

what basis to seek judicial review; and 4) to demonstrate that administrative decision-making is careful, reasoned, and equitable. Further, if a governing statute expressly requires findings on specific issues, as the Health and Safety Code does with regard to variances, for example, courts take a strict view of this requirement and will not hesitate to reverse an agency's decision if it fails to make these findings or if the findings are not supported by evidence in the record.

Once the court has heard the matter, it can either find in favor of the hearing board and deny the writ, or it can grant the writ of mandamus and command the hearing board to set aside its decision or reconsider the decision in light of the court's opinion and judgment. In the latter instance, the court's opinion will be reflected in findings of fact and conclusions of law which should state the hearing board's errors in sufficient detail so that these errors may be corrected. The hearing board, in turn, can file a notice of appeal from the superior court's judgment, or it can comply with the court order by taking any further action that is consistent with the court's decision. Further proceedings may be held by the hearing board to correct errors identified by the court; the nature of the proceedings necessarily depends on the court's judgment.

IX Conclusion

This information shows that hearing board service can be demanding and complicated. But, for many hearing board members, the work is also satisfying. Some members enjoy the fact-finding and decision-making processes; some members welcome the opportunity to have a substantial impact on individuals, businesses, and

[6] *Topanga Ass'n for a Scenic Community* v. *County of Los Angeles* (1974) 11 Cal.3d 506, 515.

the quality of the air. Most members find the hearing board experience interesting. We hope that this information will make the work easier.